

# Know Your State's Confidential Security Requirements and the Ethical Considerations of Practicing in Different Jurisdictions



# Open Government v. Security Information

Secretary Rosemary Chiavetta  
Pennsylvania Public Utility Commission



# Balancing Transparency and Security

- ▶ Critical Energy Infrastructure Information (CEII)
- ▶ Confidential Security Information (CSI)
- ▶ Electric Substations; detailed pipeline maps and interconnections; natural gas fields, wells, compressor stations and storage facilities; refineries and processing plants; water facilities; rail facilities; telecommunications facilities; dams; details of transmission lines; chemical and hazardous materials manufacturing plants.



# States with Exemptions for CEI and CSI

- ▶ Florida's Open Government Sunset Review Act requires reenactment of exemptions - defend necessity of maintaining confidentiality
- ▶ Indiana, Kentucky, Louisiana, North Carolina, Pennsylvania and Washington enacted comprehensive statutes
- ▶ Missouri and Nebraska exempt "energy infrastructure"
- ▶ Virginia exempts "specific engineering plans and descriptions of existing utility plants and equipment"
- ▶ FERC exempts Critical Electric Infrastructure from FOIA
- ▶ Colorado, Iowa and Oregon adopted the FERC rule



# Pennsylvania's Public Utility Confidential Security Information Disclosure Protection Act of 2006

- ▶ Utility has the responsibility to clearly identify and label the CSI.
- ▶ Cover Letter telling the Commission CSI is included
- ▶ Utility should submit two versions: Public with redactions and Confidential
- ▶ RTK Law in PA protects only records made confidential by law.
- ▶ Commission has responsibility to protect CSI once it is filed.
- ▶ Knowing or reckless release of CSI is criminal in PA - Secretary is named in the statute.
- ▶ Ethical duty to protect CSI found in historical files.

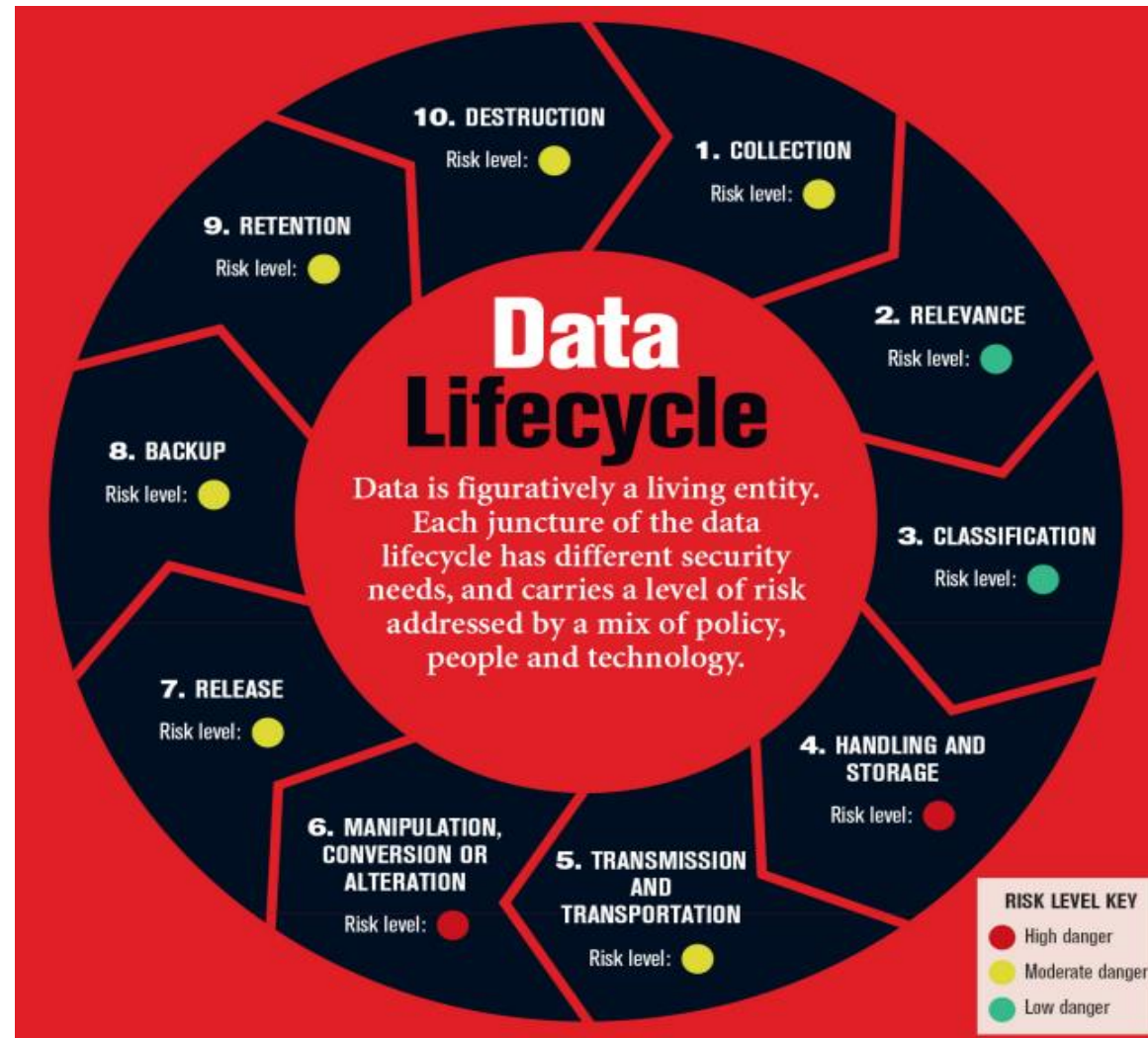


# Who Can Review CSI?

- ▶ In PA - restricted access only through the Secretary's office
- ▶ PUC Staff must go through series of protocols to review CSI
  - ▶ Review in place; NO COPIES
- ▶ Outside Party - Commission can impose conditions to review CSI
  - ▶ Criminal Background checks
  - ▶ Disclosure agreement
  - ▶ Consent in writing
  - ▶ Other conditions
  - ▶ **Commission must weigh a balancing test in PA - the sensitivity of the information vs. potential harm or risk if CSI is released**



# Erasing the Electronic Footprint Paper is easy - Just Shred It!





# Social Media

- ▶ Verify where the outbound information is going
- ▶ Trusted source of information
- ▶ Are there “point people” you can contact
- ▶ Third Parties who may be reposting or re-tweeting information
- ▶ Never use third party images without permission
- ▶ Avoid “stock” photos in emergency situations
- ▶ Monitor inbound messages/rumor control
- ▶ Don’t joke about critical information - not the time to be funny
- ▶ When in doubt - don’t send the information



# Know Your State's Confidential Security Requirements and the Ethical Considerations of Practicing in Different Jurisdictions

# Multi-Jurisdictional Practice



Debrea Terwilliger  
Assistant Staff Counsel  
State of Nevada  
Public Utilities Commission

# What is multi-jurisdictional practice?

- It is the delivery of legal services in jurisdictions other than where the attorney is admitted to practice law.
- As more clients conduct their business across state lines and law firms operate in multiple jurisdictions, the issue of multi-jurisdictional practice is becoming more of a concern.

# Ethical Considerations

- There are ethical considerations with multi-jurisdictional practice.
- Attorneys need to guard against the unauthorized practice of law.
- States vary widely in how they handle the activities of out-of-state attorneys.
- Attorneys may have to research court rules or opinions, statutes, regulations and ethics commission decision to determine each state's rules.

# ABA Model Rule 5.5

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an ***office or other systematic and continuous presence in this jurisdiction*** for the practice of law; or

(2) **hold out to the public** or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

# ABA Model Rule 5.5 cont.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or ***reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction***, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c) (2) or (c)(3) ***and arise out of or are reasonably related to the lawyer's practice*** in a jurisdiction in which the lawyer is admitted to practice.

## ABA Model Rule 5.5 cont.

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates, ***are not services for which the forum requires pro hac vice admission***; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be ***based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice***; or

(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

## ABA Model Rule 5.5 cont.

(e) For purposes of paragraph (d):

(1) the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority; or,

(2) the person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction must be authorized to practice under this rule by, in the exercise of its discretion, [the highest court of this jurisdiction].

# How ABA Model Rule 5.5 is used

- States have not uniformly adopted this model rule.
- In particular, the guidelines in ABA Model Rule 5.5 regarding alternative dispute resolution have not been consistently adopted.

# Other Ethical Considerations

- Attorneys must ensure they are ***competent*** to perform the legal services in other jurisdictions.
- For example, for practice before other state PUCs, are you familiar enough with the statutes/regulations, and local practice and customs, such that you can competently provide legal services for a client before that state commission?
- ABA Model Rule 1.1 requires that all lawyers provide competent representation to their clients, with competency being defined as legal knowledge, skill, thoroughness and preparation reasonably necessary for representation.

# What's next after determining competency?

- You must determine if you are permitted to practice law without being barred in the state.
- Consider:
  - Pro Hac Vice admittance.
  - You will likely need a sponsoring attorney or to associate with an attorney.
  - Understand what each jurisdiction's definition of the "practice of law" constitutes. (Hint: if the state has a definition, it is likely broader than traditional litigation and may include contract negotiations.)

# Pro Hac Vice Admittance

- There may be a limit on how many times you can get Pro Hac Vice admittance.
- You may need to check in multiple places to be sure if more than one rule might apply.
- Examples of applicable regulations before state commissions:
  - Nevada
  - New Mexico

# Nevada

## **NAC 703.510 Representation: Generally; by attorney.**

1. Subject to the specific requirements provided in this section for representation by an attorney, in any proceeding before the Commission, a person may represent himself or herself or may be represented by an attorney or any other person who satisfies the Commission or the presiding officer that the person possesses the expertise and is otherwise competent to advise and assist in the presentation of matters before the Commission. The Commission may, for good cause shown, exclude any representative or impose conditions upon the participation of any representative appearing before the Commission pursuant to the provisions of this section.
2. ***The provisions of this section rather than the provisions of Nevada Supreme Court Rule 42 govern*** appearances before the Commission by attorneys who are not admitted and entitled to practice before the Supreme Court of Nevada.
3. An attorney appearing in any proceeding before the Commission must be duly admitted to practice and in good standing before the highest court of any state or the District of Columbia.
4. With respect to any attorney appearing as a representative in a contested case:
  - (a) An attorney who is not admitted and entitled to practice before the Supreme Court of Nevada and who does not reside in Nevada must associate with an attorney so admitted and entitled to practice and must file a notice of association with the Commission as provided in this section, unless, except as otherwise provided in paragraph (b), the attorney who is not admitted and entitled to practice before the Supreme Court of Nevada and who does not reside in Nevada has appeared before the Commission in the same substantive area of utility regulation in the 3 years immediately preceding the date on which the case is accepted for filing. For the purposes of this paragraph, the regulation of railroads, telecommunications carriers, water utilities, electric utilities and natural gas utilities are deemed to be different substantive areas of utility regulation
  - (b) Notwithstanding any prior appearances before the Commission, the Commission, for good cause shown, may require the attorney who is not admitted and entitled to practice before the Supreme Court of Nevada and who does not reside in Nevada to associate with an attorney so admitted

# Nevada, cont.

5. A notice of association required pursuant to this section must:

- (a) Identify each jurisdiction in which the attorney who is required to file the notice is duly admitted and in good standing;
- (b) Identify by name and State Bar of Nevada identification number the attorney with whom the attorney who is required to file the notice is associating;
- (c) Describe the qualifications of the attorney who is required to file the notice to advise and assist in the presentation of the contested case before the Commission; and
- (d) Be signed by the attorney who is required to file the notice and by the attorney with whom the attorney who is required to file the notice is associating.

6. Except as otherwise provided in subsection 7, the Commission or presiding officer may require the attorney who is admitted and entitled to practice before the Supreme Court of Nevada and who is identified in a notice of association required by this section to sign any pleadings and be present at any proceeding on the record.

7. An attorney who resides in Nevada and who is not admitted and entitled to practice before the Supreme Court of Nevada may not appear in any proceeding before the Commission unless the attorney:

- (a) Is qualified or has an application for qualification pending for the limited practice of law pursuant to Nevada Supreme Court Rule 49.10; and
- (b) Associates with an attorney who is admitted and entitled to practice before the Supreme Court of Nevada and files a notice of association as provided in this section. The attorney who is admitted and entitled to practice before the Supreme Court of Nevada and who is identified in a notice of association required by this section must sign any pleadings and be present at any proceeding on the record.

# New Mexico

**1.2.2.9 PRACTICE BEFORE THE COMMISSION:** (See 18.60.4.11 NMAC for matters involving owners and operators of gas and hazardous liquid pipelines and underground facilities, excavators, and one-call notification systems.)

- A.** An individual may appear as a party in person or by an attorney licensed to practice law in New Mexico at either informal or formal proceedings.
- B.** Entities other than an individual may appear as a party at informal proceedings by an officer or employee of the entity.
- C.** Commenters may appear in person or by an attorney at any proceeding.
- D.** Except as provided in this section, entities other than an individual must be represented by an attorney licensed to practice law in New Mexico at all formal proceedings.
- E.** An attorney licensed in a jurisdiction other than New Mexico may appear at public hearings before the commission or presiding officer provided such non-resident attorney files a motion *pro hac vice* and is associated with and accompanied by an attorney licensed in New Mexico.

# New Mexico, cont.

## **Rule 24-106. Practice by nonadmitted lawyers.**

**A. Conditions of appearance.** Upon compliance with the requirements of this rule, but only in association with an active member in good standing as a member of the State Bar of New Mexico, an attorney authorized to practice law before the highest court of record in any state or country (“nonadmitted attorney”) may perform legal services on behalf of a client or a party, even though the attorney is not licensed to practice law in this state unless otherwise excepted under Rule 16-505(F) NMRA. A non-admitted attorney shall comply separately for each action, suit, proceeding, or transactional matter in which the attorney plans to perform legal services with the limitation that the non-admitted attorney ***may not register more than five (5) times in any given calendar year.***

# New Mexico, cont.

**B. Registration certificate.** For each action, suit, proceeding, or transactional matter in which the attorney intends to appear, the nonadmitted attorney shall file a registration certificate with the State Bar of New Mexico. Information related to the non-admitted attorney's registration under this rule is publicly available. The attorney shall identify the proceeding in which the attorney intends to appear and the local counsel with whom the attorney is associating, and shall certify that

(1) the attorney is admitted or licensed as an attorney in good standing in another state or country and shall submit a certificate of good standing from every state or country in which the attorney is admitted or licensed;

(2) the attorney has not been disciplined, suspended, or disbarred in any jurisdiction;

(3) the attorney has not had a pro hac vice admission revoked in any jurisdiction;

(4) the attorney will comply with applicable statutes, laws, and procedural rules of the state of New Mexico; and

(5) the attorney will comply with the Rules of Professional Conduct, the Rules Governing Discipline, the Rules Governing the New Mexico Bar, and the rules governing civil, criminal, and appellate procedure approved by the Supreme Court, and will submit to the jurisdiction of the New Mexico courts and the Disciplinary Board with respect to acts and omissions occurring during the attorney's admission under this rule and with respect to the requirements of Rules 1-089.1, 2-107, 3-107, 5-108, 12-302, 16-104(C) and 24-106 NMRA.

# Questions/Comments

- Any questions or comments?

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